No. 14,506

IN THE

United States Court of Appeals

For the Ninth Circuit

ROBERT L. HALL,
Plaintiff and Appellant,

vs.

COPCO PACIFIC, LTD., a Delaware corporation,
Defendant and Appellee.

APPELLANT'S OPENING BRIEF.

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APPELLANT'S OPENING BRIEF.

This is an action to recover damages for injuries sustained by plaintiff, a citizen and resident of the State of Washington, on the 10th day of December, 1952, in the State of Oregon, during the course of his employment by defendant, a Delaware corporation, with principal place of business in the State of California.

The action was filed on the last day of the two-year period next following the date of injury, within the Oregon statutory period of limitation.

The first amended complaint (Tr. pp. 3-6) alleges that plaintiff was injured when the motor vehicle with

which defendant had supplied him to deliver machinery to a customer in the State of Oregon was involved in a collision because of the failure of the defendant properly to load and secure the machinery which moved or shifted and caused plaintiff to lose control of the motor vehicle. (Tr. pp. 3-6.)

Liability is predicated (1) upon the Oregon Employers Liability Act (Ore. Rev. Stats., Sections 654.035, et seq.) on the ground that the employment of plaintiff involved risk or danger against which defendant had not protected him (Tr. p. 4), and (2) upon the Oregon Workmen's Compensation Act (Ore. Rev. Stats., Sections 656.001, et seq.) on the ground that defendant was in default under that Act and, therefore, liable for negligence in not properly loading and securing the machinery. (Tr. p. 5.)

Defendant answered, denying the material allegations of the Complaint and setting up several affirmative defenses, including that of the statute of limitations, which is the only one pertinent to this appeal. (Tr. p. 6.)

Defendant also moved for summary judgment on the ground that the action was barred by the statute of limitations. (Tr. pp. 8-9.)

The motion was heard on the basis of the first amended complaint alone, no supporting affidavit having been filed, and was allowed on the ground that the action was barred on the face of the complaint by Section 340.3 of the California Code of Civil Procedure. (Tr. p. 9.) A judgment of dismissal was thereafter entered. (Tr. p. 10.)

Plaintiff appeals from the order granting the motion for summary judgment and from the judgment of dismissal. (Tr. p. 11.)

THE QUESTION FOR DECISION.

Counsel for defendant conceded in the Court below that the law of the forum (California) controls in determining the period of limitation upon plaintiff's right to sue.

The only question for determination is whether the law of the forum (California) or the law of the state by which the cause of action was created (Oregon) should control in determining the nature of the cause of action for the purpose of classification under the California statute of limitations, and application of the appropriate section thereof.

The law of the State of California regards both causes of action as being statutory (*Rideaux v. Torgrimson,* 12 Cal. 2d 633, Subs. App. 39 C.A. 2d 273) while under the law of the State of Oregon they are treated as being founded in the common law. (*Shelton v. Paris,* 261 Pac. 2d 856.)

If then in determining the nature of the causes of action, the law of the forum is to control and the causes of action are to be regarded as being purely statutory, the California three (3) year statute of limitations contained in Section 338(1) applicable to actions "upon a liability created by statute * * *" would apply, with the result that plaintiff's action would not be barred. On the other hand, if the nature

of these causes must be determined by Oregon law which holds that they are founded in the common law of negligence, then it is conceded that they would fall within Section 340(3) of the California Code of Civil Procedure, applicable to injuries "caused by the wrongful act or neglect of another * * *", and would be barred.

ARGUMENT.

I.

THIS BEING A DIVERSITY CASE, THE CONFLICT OF LAWS RULES OF THE CALIFORNIA STATE COURTS IS CONTROLLING.

In diversity cases, the Federal Courts are bound to apply the conflict of laws rules of the state of the forum.

In the case of *Klaxon v. Stentor El. Mfg. Co.,* 313 U.S. 486, 85 L. Ed. 1477, the Supreme Court of the United States ruled that a United States District Court sitting in Delaware on a cause of action arising upon a contract executed in New York should have denied interest in accordance with the Delaware law although the New York law allowed interest from the date action was commenced. The Supreme Court said, at page 496:

> "We are of the opinion that the prohibition declared in Erie Railroad Co. v. Tompkins, 304 U.S. 64, 82 L. ed. 1188, against such independent determinations by the federal courts extends to the field of conflict of laws. *The conflict of laws rules to be applied by the federal court in Dela-*

ware must conform to those prevailing in Delaware's state courts. Otherwise the accident of diversity of citizenship would constantly disturb equal administration of justice in co-ordinate state and federal courts sitting side by side. Any other ruling would do violence to the principle of uniformity within a state upon which the Tompkins decision is based. *Whatever lack of uniformity this may produce between federal courts in different states is attributable to our federal system which leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors. It is not for the federal courts to thwart such local policies by enforcing an independent "general law" of conflict of laws.* Subject to review by this Court on any federal question that may arise, Delaware is free to determine whether a given matter is to be governed by the law of the forum or some other law." (Emphasis added.)

This Honorable Court itself recognized and applied the rule of the *Klaxon* case in the case of *Zellmer v. Acme Brewing Co.,* 184 F. 2d 940, in which it was said at page 942:

"In a diversity case, a federal court is bound to follow the law of the state in which it is sitting, and such reference includes the state's conflict of laws rules as well as the state's internal law. Klaxon Company v. Stentor Electric Mfg. Co., Inc., 1941, 313 U.S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477 * * *

"In American and English law it is a general rule that when a foreign cause of action is as-

> serted the law of the forum governs as to the remedy. Statutes of Limitation are generally considered procedural, since ordinarily the law of the forum governs the case * * *". (Emphasis added.)

The law of the forum also controls in the determination of what is substantive and what is procedural.

McMillen v. Douglas Aircraft Corp., 90 F. Supp. 670.

From these decisions, therefore, it is apparent that the answer to the question presented by this appeal must be found in the law of the State of California, the forum.

II.

UNDER CALIFORNIA PRINCIPLES OF CONFLICT OF LAWS, THE LAW OF THE FORUM CONTROLS AS TO ALL PROCEDURAL MATTERS INCLUDING THE DETERMINATION OF THE NATURE OF THE CAUSE OF ACTION.

The California courts have consistently followed the rule adopted by the vast majority of the states that in passing upon causes of action arising elsewhere they will be governed by the *lex loci* only upon substantive matters but will apply the California law upon matters of procedure.

Grant v. McAuliffe, 41 Cal. 2d 859.

In the above case, the question arose as to whether a cause of action based upon the Arizona death statute would survive the death of the tort-feasor under the

California survival statutes (Calif. Civ. Code, Sect. 946, Code Civil Proc., sect. 385 and Probate Code, Sects. 573 and 574) although the Supreme Court of the State of Arizona had held that the action will not survive unless it be commenced prior to the death of the tort-feasor. The California Supreme Court held that under the law of this state the question of survival of actions is purely procedural and that the California survival statutes would, therefore, be applied.

> "Thus, the answer to the question whether the causes of action against Pullen survived and are maintainable against his estate depends on whether Arizona or California law applies. In actions on torts occurring abroad, the courts of this state determine the substantive matters inherent in the cause of action by adopting as their own the law of the place where the tortious acts occurred, unless it is contrary to the public policy of this state. (Loranger v. Nadeau, 215 Cal. 362 [10 P. 2d 63, 84 A.L.R. 1264].) 'No Court can enforce any law but that of its own sovereign, and, when a suitor comes to a jurisdiction foreign to the place of the tort, he can only invoke an obligation recognized by that sovereign. A foreign sovereign under civilized law imposes an obligation of its own as nearly homologous as possible to that arising in the place where the tort occurs.' (Learned Hand, J., in Guiness v. Miller, 291 F. 769, 770.) But the forum does not adopt as its own the procedural law of the place where the tortious acts occur. *It must, therefore, be determined whether survival of causes of action is procedural* or substantive for conflict of laws purposes.

> *This question is one of the first impressions in this state.* The precedents in other jurisdictions are conflicting. In many cases it has been held that the survival of a cause of action is a matter of substance and that the law of the place where the tortious acts occurred must be applied to determine the question."
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> * * * * * * *
>
> *"Since we find no compelling weight of authority for either alternative, we are free to make a choice on the merits. We have concluded that survival of causes of action should be governed by the law of the forum.* Survival is not an essential part of the cause of action itself but relates to the procedures available for the enforcement of the legal claim for damages." (Emphasis added.)

The California Courts have also followed the vast majority of states in holding that statutes of limitation are purely procedural.

Biewend v. Biewend, 17 Cal. 2d 108.

In the case of *Western Coal & Mining Co. v. Jones,* 27 Cal. 2d 819, the California Supreme Court went a step further and held that the sufficiency of an acknowledgment to remove the bar of the statute of limitations would be determined under California law although the Courts of the state where the cause arose had already adjudicated the acknowledgment as being insufficient. The Court said at page 828:

> "The law of the forum rather than where the obligation arose governs statutes of limitation *and their applicability* * * * Therefore, Arizona was applying its own law * * *, not California law

> because the Arizona court was the forum. In the instant case the California court is the forum and we apply our law, which, as we have seen, reaches a different result * * *'' (Emphasis added.)

It is clear from the case last cited that the California Courts regard not only the statute of limitations as being procedural but also all matters incidental to its application.

From the *Western Coal & Mining Co.* case (supra) it is but a short step to the case of *Miller v. Lane,* 160 Cal. 90, in which it was held that the California Courts would also determine the nature of the cause of action itself for the purpose of applying the California statute of limitations.

In the *Miller* case, action was brought to enforce a stockholder's liability under the Colorado Stockholders Liability Act. Under the Colorado law the stockholder's liability was held to be secondary and as such enforceable only in equity. Under the California law the liability is primary and original. If the Colorado law had been controlling, the California statute of limitations would have been four (4) years and the action timely brought. The California Supreme Court, however, held that California law as to the nature of the cause was controlling with the result that the action was barred by the California three (3) year statute. The Court said at page 92:

> ''The statutory law of Colorado, as interpreted by the Supreme Court of that state, makes the liability of a stockholder for a corporation's debts a secondary obligation, to be enforced by a suit

> in equity * * * *The statute of limitations of the state where the suit is brought must govern.* It is clear that we must consider the case at bar as one brought to enforce an original statutory liability and it is equally clear that the cause of action against the defendant arose at least as far back as June 9, 1905, when suit was brought by the creditors against the corporation. *We cannot subject the defendant, who is and for ten years has been a resident of California, to any special law or judicial ruling of the State of Colorado, prescribing the form of action upon his statutory liability for the debts of the corporation of which he was a stockholder. In such an action as this the lex fori must prevail* * * *''' (Emphasis added.)

Thus, under California law, the determination of the nature of the cause of action for the purpose of applying the statute of limitations must be regarded as being purely procedural and the determination must, therefore, be made under California law—not the *lex loci.*

III.

UNDER THE LAW OF THE STATE OF CALIFORNIA BOTH PLAINTIFF'S CAUSES OF ACTION ARE STATUTORY.

Examination of the Oregon's Workmen's Compensation Act and Employer's Liability Act reveals a close similarity to the California Workmen's Compensation Act.

Under both California and Oregon law, the remedy under the Workmen's Compensation Acts is exclusive

unless the employer has failed to secure the payment of compensation to the injured employee.

California Labor Code, Sec. 2801;
Bigby v. Pelican Bay Lbr. Co., 147 Pac. 2d 199.

Under both systems, when the employer has failed to secure the payment of compensation, the employee is given a right of civil action for damages.

California Labor Code, Sec. 3706;
Oregon Rev. Stats., Sec. 656.560(5).

Under both systems, in such civil actions, the old common law defenses of contributory negligence, assumption of risk and fellow servant rule are abolished.

California Labor Code, Sec. 3708;
Oregon Rev. Stats., Sec. 656.324(4).

The Oregon Employer's Liability Act (O. R. S., Sec. 654.035) imposes an additional liability upon employers in any work involving risk or danger to the employee for failure to

> "use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliances and devices."

Like the cause of action under the Oregon Workmen's Compensation Act, the employee's right to maintain his action under the Oregon Employer's Liability Act is subject to the same restrictions as

the cause of action under the Workmen's Compensation Act, i.e., the employer must be in default or otherwise have forfeited his right to the protection of the Act against suit by the employee. (Oregon Rev. Stats., Sec. 656.006.)

In the case of *Rideaux v. Torgrimson,* 12 Cal. 2d 633, the California Supreme Court held that the employee's cause of action against the employer under the California Workmen's Compensation Act was purely statutory in nature and therefore survived the death of the employer tort-feasor.

> *"By section 29b (Labor Code, sect. 3706) the legislature provided a statutory cause of action for personal injuries quite different from that of the common law.* If an employer fails to secure the payment of compensation, either an injured employee or his dependents may sue the employer, or 'the legal representatives of any deceased employer', for damages. In such an action the plaintiff may attach the property of the employer and is given the benefit of a presumption that the employer was negligent. The employer may not defend upon the ground that the employee was contributorily negligent, or assumed the risk of the hazards attending his employment, or that he was injured through the negligence of a fellow servant.
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> * * * * * * *
>
> *"The social public policy of the state is declared in the statute, which, it is said, is intended to make effective a complete system of workmen's compensation irrespective of the fault of any party, and also to require full provision for ad-*

equate insurance coverage against the liability to pay or furnish compensation. (Sec. 1.) For those injured employees who find themselves without the protection of the insurance required by the compensation law, the legislature has provided a remedy having somewhat the nature of a penalty. In such a case the burden of proof is largely upon the employer. To escape liability he must prove that he was not guilty of negligence, notwithstanding the presumption to the contrary provided by the statute.

There is sound reason for making such a cause of action survive the death of the employer. By provisions of the statute which cover the subject in detail, an employee's right to compensation continues notwithstanding the death of his employer, and it is clear that the legislature, by its definition of the term 'employer', intended to place an injured employee for whom no compensation has been secured upon the same basis, so far as his right to recover after the death of his employer is concerned, as one who is protected by insurance." (Emphasis added.)

Because of the essential similarity between the California and Oregon systems of workmen's compensation and the identity of purpose behind each of them, there is every reason to believe from the California cases cited above that the California Courts if called upon to construe the Oregon causes of action upon which plaintiff relies, would regard them as being purely statutory for purposes of applying the California Statute of Limitations, the decision of the Oregon Supreme Court to the contrary not-

withstanding, and would apply the California three (3) year period of limitation.

CONCLUSION.

It is submitted that under California law, which must be applied in this case, plaintiff's causes of action are both statutory and subject—not to the one (1) year statute of limitations applicable to common law actions for negligence—but to the three (3) year statute of limitations contained in California Code of Civil Procedure, Section 338(1), applicable to statutory liabilities.

The District Court, therefore, erred in allowing defendant's motion for summary judgment and in making and entering its judgment of dismissal. The judgment and order complained of should be annulled, vacated and set aside and the case remanded to the District Court for trial.

Dated, San Francisco, California,
December 10, 1954.

Respectfully submitted,
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